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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES H. KERKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends (Pet. 8-17) that the Double Jeopardy Clause bars his retrial because his motion for a mistrial was prompted by a midtrial ruling that he did not seek and that undermined his ability to obtain a fair trial.

1. On January 30, 1984, petitioner and co-defendant Robert D. Fischl were indicted by a federal grand jury in the Western District of Michigan for mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343 (six counts), interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314 (two counts), and conspiracy to commit mail and wire fraud and to defraud the IRS, in violation of 18 U.S.C. 371 (two counts). Each defendant was also charged in separate counts with aiding and assisting in the preparation of a false and fraudulent tax return, in violation of 26 U.S.C. 7206.

Approximately seven months later, a joint trial on these charges commenced.[1] After the government rested its case, co-defendant Fischl also rested without presenting any evidence, and the trial court instructed the jury that the case against Fischl was closed. The proceedings were then recessed for four days to give petitioner additional time to prepare his case. When the trial resumed, petitioner took the stand. After petitioner testified on direct examination for a short time, co-defendant Fischl requested a jury instruction to the effect that petitioner's testimony should not be considered against Fischl. The government responded that the jury should be allowed to consider petitioner's testimony in deciding Fischl's case. Pet. App. 5-6.

The district court ruled that the proof concerning Fischl's case had been closed and that it would not permit the introduction of any additional evidence against him. The court noted that it had the option of allowing the joint trial to proceed with "a strong limiting instruction" to the jury prohibiting the use of petitioner's testimony against Fischl, but concluded that it would grant Fischl's motion for a severance (Pet. App. 21). The court then announced that the proceedings against petitioner would be temporarily adjourned and the case against Fischl submitted to the jury. Petitioner did not initially object to the procedure, but shortly thereafter requested a mistrial on the ground that he would be prejudiced by the jury's deliberation of Fischl's case. The court denied petitioner's motion. Thereafter, the jury convicted Fischl on six counts, five of which also named petitioner. Pet. App. 6-8, 14-30.

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[1]The pertinent proceedings are summarized in the opinion of the court of appeals (Pet. App. 2-3) and in the district court's opinion (*id.* at 5-10). Relevant record excerpts are included in the petition (*id.* at 14-78).

One week later, petitioner moved for dismissal of the charges against him, contending that the jury was irreparably tainted by its deliberations on the Fischl case and that the government was responsible for that taint because its actions led to the "severance." At the hearing on that motion (Pet. App. 34-59), the court and the parties agreed that the submission of Fischl's case to the jury tainted the jury with respect to petitioner's case.[2] The court stated, however, that it was "inclined" to deny dismissal. The court then suggested that mistrial would be the appropriate remedy and solicited the parties' views on that proposal. The government asked that the trial proceed notwithstanding the jury taint. Defense counsel consulted petitioner and advised the court (Pet. App. 43): "[Petitioner] feels that he has no choice, and he will have to ask that the proceedings that we are in now be terminated. It is his opinion now that he could not obtain a fair and impartial trial by the jury we have, and if his only remedy is a mistrial, then that would be the remedy that he would have to accept."

Thereupon, the court definitively denied dismissal and asked petitioner how he wished to proceed. Petitioner asked the court to order a mistrial "on its own" to which he "would not object," but he added that "[i]f we have to do it [*i.e.*, move for mistrial] we will" (Pet. App. 62-63). The district court then ordered a mistrial "on the basis of manifest necessity" (Pet. App. 3, 78). A new trial was scheduled to commence in two months.

2. Petitioner subsequently filed a motion to dismiss on double jeopardy grounds, contending that the midtrial "severance" was tantamount to a mistrial for which there was no "manifest necessity." In its memorandum opinion

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[2]See *United States* v. *McIver*, 688 F.2d 726, 729-730 (11th Cir. 1982); *United States* v. *Stratton*, 649 F.2d 1066, 1081 (5th Cir. 1981); *United States* v. *Crane*, 499 F.2d 1385 (6th Cir.), cert. denied, 419 U.S. 1002 (1974).

denying that motion (Pet. App. 5-13), the district court ruled that "[o]nce the guilty verdict was rendered against Fischl by the jury," petitioner could not be fairly tried before the same jury and therefore his declaration of a mistrial was justified by "manifest necessity." The court also rejected the argument that the midtrial ruling itself amounted to a mistrial and ruled that, in any event, there was manifest necessity for the decision to submit Fischl's case to the jury while suspending consideration of petitioner's case because "[i]n light of the circumstances existing at that point in the trial, there was no viable alternative to severance" (*id.* at 12).

The court of appeals agreed that the Double Jeopardy Clause did not bar petitioner's retrial (Pet. App. 1-4). The court explained that the mistrial was necessary because "the premature submission of co-defendant Fischl's case to the jury had irretrievably prejudiced [petitioner's] own right to a fair trial." The court of appeals noted further that "the record * * * [leaves] no doubt that [petitioner] had expressed a preference to renew his previous motion for a mistrial if the court were to deny his motion to dismiss and compel him then to proceed with the trial before the original jury." Finally, the court observed that although the submission of Fischl's case to the jury was error, "there was a total absence of any bad faith or intent to harass or prejudice [petitioner]." *Id.* at 4.

3. It is well established that, when a defendant successfully moves for a mistrial, the Double Jeopardy Clause bars a retrial only if there was prosecutorial misconduct deliberately designed to provoke the defendant into moving for a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667 (1982); *Arizona* v. *Washington*, 434 U.S. 497 (1978). Petitioner does not dispute (see Pet. 13) that he sought and consented to the court's declaration of a mistrial after the jury convicted co-defendant Fischl and, indeed, he appears to take the

position that the mistrial was in any event justified by manifest necessity. Thus, it is clear that the actual declaration of the mistrial does not create a double jeopardy bar.

Petitioner's argument instead rests on the proposition (Pet. 15) that "the mid-trial severance [of his co-defendant] was tantamount to a mistrial," and the court's action at that point was neither sought by petitioner nor justified by manifest necessity. The courts below correctly rejected this contention. The trial court's decision to submit co-defendant Fischl's case to the jury and then later resume the proceedings against petitioner with the same jury may well have been error, but it was not tantamount to declaring a mistrial with respect to petitioner. It is clear that the district court intended to proceed with the trial of petitioner's case after the jury returned a verdict in Fischl's case; therefore, the order in question plainly was not intended as a declaration of mistrial.

Nor was it equivalent as a practical matter to declaring a mistrial. First, if Fischl had been acquitted, there would have been little basis for granting a mistrial motion by petitioner. See *United States* v. *Crane*, 499 F.2d 1385, 1388 (6th Cir.), cert. denied, 419 U.S. 1002 (1974). Even after the jury returned a guilty verdict against Fischl on some counts, thereby handicapping petitioner's defense, petitioner's trial was not automatically terminated. At that point, petitioner was "faced with a trial strategy decision a defendant often encounters after prejudicial error has allegedly occurred, whether to move for a mistrial or to proceed on to a verdict in the hope of obtaining an acquittal." *United States* v. *Miller*, 742 F.2d 1279, 1285 (11th Cir. 1984), cert. denied, No. 84-1088 (Feb. 19, 1985). Petitioner could have elected to allow the trial to proceed to completion. If he had been convicted, his remedy would have been an appeal and a new trial.[3] Instead he elected to seek termination of the trial.

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[3]Indeed, the record reflects that this possibility of continuing with the trial was discussed at the hearing. See Pet. App. 48-49, 68.

While this course of action spared him the need to seek appellate reversal of a conviction, there is no reason why it should spare him the need to undergo a new trial. Unless the error is occasioned by prosecutorial misconduct designed to provoke a mistrial, "[i]f the judge makes a procedural mistake during trial, and the result is not an 'acquittal,' the mistake may be corrected and the defendant tried again." *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir. 1985), cert. denied, No. 85-5399 (Nov. 4, 1985). While it is unfortunate that the error made by the trial court impaired petitioner's opportunity to receive a fair hearing before the first trier of fact, recognized double jeopardy principles establish that the result of such an error is not the windfall of denying the prosecution any opportunity to bring its case to verdict.

The cases on which petitioner relies (see Pet. 11) are inapposite because in those cases the defendant did not have an opportunity to proceed to verdict before the first factfinder. While each of those cases involved a joint trial in which the court concluded in the midst of the trial that the trial could not proceed against all defendants, there is no doubt that the court in each of those instances resolved the problem by declaring a mistrial immediately and terminating the trial against one of the defendants without his consent.[4] The defendants in question therefore had no opportunity to receive a verdict at the hands of the first factfinder.

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[4]In *United States* v. *Glover*, 506 F.2d 291, 293 (2d Cir. 1974), and *United States* v. *Posner*, 764 F.2d 1535 (11th Cir. 1985), the trial court declared a mistrial as to one of the defendants because of *Bruton* problems (see *Bruton* v. *United States*, 391 U.S. 123 (1968)) raised during trial by the admission of the statements of one of the defendants. The other defendants had not rested, and the court immediately declared a mistrial; it did not consider holding the trial of the severed defendants in abeyance. In *United States* v. *Tinney*, 473 F.2d 1085 (3d Cir.), cert. denied, 412 U.S. 928 (1973), the court declared a mistrial as to one defendant when he did not appear in court on time and the court wished to proceed with the trial.

Here, by contrast, the court did not declare a mistrial. It submitted Fischl's case to the jury and then continued with petitioner's case. It was petitioner's decision not to allow his case to proceed to verdict; in the absence of a deliberate attempt by the prosecution to provoke a mistrial, there is no double jeopardy bar to one complete prosecution of petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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